Exhibit 1

Dockets.Justia.com

C
Briefs and Other Related Documents
Sharju Ltd. Partnership v. Choice Hotels Intern., Inc.N.D.Tex.,2002.Only the Westlaw citation is currently available.

United States District Court, N.D. Texas, Dallas Division.
SHARJU LIMITED PARTNERSHIP, Plaintiff,
v.
CHOICE HOTELS INTERNATIONAL, INC., Defendant.
No. Civ.A.3:01-CV-2605-X.

Jan. 22, 2002.

MEMORANDUM OPINION AND ORDER
KENDALL, J.
*1 Before the Court is Defendant's Motion to Compel Arbitration, filed December 7, 2001; Plaintiff's Response to Defendant's Motion to Compel Arbitration, filed December 27, 2001; and, Defendant's Reply, filed January 11, 2002. Having considered the evidence, the pleadings, and the applicable law, the court concludes that Defendant's Motion to Compel Arbitration should be GRANTED, and that these proceedings should be STAYED pending final, binding arbitration in Silver Spring, Maryland.

BACKGROUND

*1 Plaintiff Sharju Limited Partnership ("Sharju") filed suit against Defendant Choice Hotels International, Inc. ("Choice"), alleging that Choice tortiously interfered with Sharju's contract with a third party, Pandora Properties, Inc. ("Pandora"). Specifically, Sharju claims that Choice intentionally misrepresented Sharju's ability to covey certain hotel property to Pandora, thus prompting Pandora to abandon the sale.

*1 Sharju owns and operates a Sleep Inn hotel in Addison, Texas (the "hotel") as Choice's franchisee. The Sleep Inn Franchise Agreement ("Franchise Agreement") governs the relationship between Sharju and Choice with regard to the operation of the hotel. Section 10 of the Franchise Agreement grants Choice a right of first refusal should Sharju elect to sell any hotel covered by the agreement. FN1

FN1. Section 10 provides for a fairly specific manner in which Sharju must notify Choice of its intention to sell the hotel. The agreement states, for example, that the
Franchisee shall forthwith notify Franchisor of the terms and conditions of any acceptable, bona fide offer to acquire all or part of Franchisee's interest in the Hotel made to him by a third party (along with a copy of any existing or proposed sales contract). Such writing shall set forth the complete terms of the offer, and Franchisee shall furnish Franchisor with any financial or operating data reasonably required to evaluate such offer.
Defendant's Motion to Compel Arbitration, Exhibit A at 6 [hereinafter "Ex. A at __"]. Similarly, should Choice exercise its right of first refusal, it must:
give notice of its decision to do so in writing to Franchisee within ten (10) days after receipt of notification of the offer from Franchisee. Any modified, changed or subsequent offer shall also be submitted to Franchisor in the same manner.
Id. Finally, the Franchise Agreement voids any transfer or attempted transfer that is not in compliance with the above provisions, and deems such non-compliance a material and incurable breach of the entire Agreement. Id.

*1 On July 14, 2000, Sharju and Pandora entered into an Agreement of Purchase and Sale (the "Sale Agreement") wherein Pandora agreed to purchase the hotel from Sharju. The parties dispute whether Sharju complied with Section 10 of the Franchise Agreement. Specifically, Sharju claims it notified Choice of its intent to sell the property in accordance with the Franchise Agreement, and that Choice declined to exercise its right of first refusal within the specified time period. Sharju further alleges that Choice wrongfully interfered with the Sale Agreement by making alleged misrepresentations to the buyer. Choice disputes whether Sharju complied with Section 10, whether Sharju could rightfully convey its interest in the hotel, and whether it did, in fact, make any such misrepresentations to Pandora.

*1 The Franchise Agreement between Choice and Sharju contains an arbitration clause. Section 24 provides that:

*1 [A]ny controversy or claim arising out of or relating to this Agreement ... shall be submitted to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The substantive law of the State of Maryland shall be applied by the arbitrators.... Parties to this Agreement agree that any arbitration shall be conducted at the Franchisor's home office in Silver Spring, Maryland.

*1 Ex. A at 14. Choice moves to compel arbitration of plaintiff's tortious interference claim based on this arbitration clause. Sharju argues that the claim does not "arise out of or relate to" to Franchise Agreement, and thus falls outside the scope of the arbitration clause. For the reasons stated below, the court finds in favor of the defendant.

ANALYSIS

*2 At the outset, the court recognizes the strong federal policy in favoring arbitration under the Federal Arbitration Act ("FAA"). 9 U.S.C. § 2 (West Supp.2001). Accordingly, courts must resolve any "doubts concerning the scope of arbitrable issues ... in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The Fifth Circuit further instructs that "arbitration should not be denied 'unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." ' *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir.1990) (*quoting Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 338 (5th Cir.1984)). Moreover, the strong presumption in favor of arbitrability "applies even with greater force," *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 871 (10th Cir.1999) (internal citations omitted), when the parties choose a "broad" arbitration clause, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Section 24 of the Franchise Agreement broadly mandates arbitration of "any controversy or claim *arising out of or relating to* this Agreement." Ex. A at 14 (emphasis added). Such "broad" arbitration clauses "are not limited to claims that literally arise under the contract, but rather embrace all disputes having a significant relationship to the contract regardless of the label attached to the dispute." *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir.1998) (deeming "broad" a clause requiring arbitration of any dispute "arising out of or in relation to" the agreement at issue).

*2 With this background in mind, the court must determine whether Sharju's tortious interference claim "touches matters covered by the agreement." *Pennzoil*, 139 F.3d at 1068. In *Ford v. Nylcare Health Plans of the Gulf Coast Inc.*, the Fifth Circuit restated this standard in a case involving a similar arbitration clause. Under *Ford*, a "tort claim is 'related to' the agreement only if reference to the agreement is required to maintain the action. This is true notwithstanding the fact that the tort claim may implicate the agreement as a factual matter." 141 F.3d 243, 250 n. 7 (5th Cir.1998) (internal citations omitted).[FN2] Thus, the district court must examine the facts that underlie plaintiff's cause of action, and determine "whether the action could be maintained without reference to the contract." *Id.* If the factual allegations "touch matters" covered by the agreement, the claims must be arbitrated "whatever the legal labels attached to them." *P & P Indus.*, 179 F.3d at 871 (citations omitted).

FN2. In *Ford*, the Fifth Circuit applied the test required under the Texas General Arbitration Act, Tex. Civ. Prac. & Rem.Code Ann. § 171.001-171.098 (Vernon 1997 & Pamp. Supp.2001), but determined that "there is no perceptible difference between the federal and Texas standards in this respect." 141 F.3d at 250 n.7.

*2 In this case, the success or failure of Sharju's tortious interference claim depends, as a legal matter, on whether the parties complied with the terms of the Franchise Agreement. As noted above, the Franchise Agreement governs the manner in which Sharju must notify Choice of its intention to sell the franchise. The allegations of tortious conduct (i.e. whether Choice wrongfully informed Pandora of Sharju's rights to convey the hotel) is rooted in certain express terms of the Franchise Agreement. The performance or non-performance of these specific contractual duties created by the Franchise Agreement forms a condition precedent to the maintenance of plaintiff's tort claim. The manner in which these contractual provisions are applied and interpreted will most likely determine the outcome of plaintiff's claim. *See e.g.*, *Telecom Italia v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir.2001) (holding arbitration required when "the dispute occurs as a fairly direct result of the performance of contractual duties."). If, for example, Choice proves that Sharju acted in contravention of the agreement, and Choice accurately stated Sharju's rights to convey the property to Pandora, then Choice could not have tortiously interfered with the Sales Agreement. Sharju's allegations are so interwoven with the provisions of the Franchise Agreement that its tortious interference claim cannot be maintained without reference to the contract. Accordingly, the court holds that Sharju's tortious interference claim falls within the scope of the arbitration clause.

CONCLUSION

***3** For the foregoing reasons, Defendant's Motion to Compel Arbitration is GRANTED.

***3** IT IS FURTHER ORDERED that:
***3** 1. Plaintiff's claims are hereby referred to final and binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association;
***3** 2. Any arbitration of Plaintiff's claims against Defendant shall be conducted in Silver Spring, Maryland, and the law of the State of Maryland shall apply; and,
***3** 3. These proceedings are stayed.

N.D.Tex.,2002.
Sharju Ltd. Partnership v. Choice Hotels Intern., Inc.
Not Reported in F.Supp.2d, 2002 WL 107171 (N.D.Tex.)

Briefs and Other Related Documents (Back to top)

• 3:01cv02605 (Docket) (Dec. 07, 2001)

END OF DOCUMENT

Exhibit 2

Briefs and Other Related Documents
VDV Media Corp. v. Relm Wireless, Inc.N.D.Tex.,2006.Only the Westlaw citation is currently available.

United States District Court,N.D. Texas, Dallas Division.
VDV MEDIA CORPORATION, Plaintiff,
v.
RELM WIRELESS, INC., Defendant.
No. 3:05-CV-1877-H.

Feb. 27, 2006.

Michael R. Nichols, Law Office of Michael R. Nichols, McKinney, TX, for Plaintiff.
Brian A. Colao, Christopher M. Lavigne, Greenberg Traurig, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER
SANDERS, Senior J.

***1** Before the Court are RELM Wireless, Inc.'s ["RELM"] Motion to Compel Arbitration, Motion to Abate, and supporting brief and appendix, filed November 10, 2005; Plaintiff's Response to Defendant's Motion to Compel and to Abate, filed December 1, 2005; and RELM's Reply, filed December 14, 2005.

***1** For the reasons that follow, RELM's motion is granted in its entirety.

I. BACKGROUND

***1** Plaintiff VDV Media Corporation ["VDV"] and Defendant RELM are corporations conducting business in the area of wireless communication products and services. On December 23, 2003, RELM and VDV executed an agreement entitled "Independent Representative and Assumption Agreement" [the "IRA Agreement"]. The IRA Agreement set out obligations of the parties with regard to, among other things, sales and service of certain RELM products that the parties refer to as "ESAS Equipment." Specifically, Plaintiff contracted to market and sell the ESAS Equipment for Defendant RELM, and to provide related services. *See* Def's.App. at 0016-20. The IRA Agreement also contained a clause requiring mutual nondisclosure of trade secrets; a covenant not to compete; and an arbitration clause. *See id.,* IRA Agr. § § 11, 12, 15. Plaintiff now alleges that RELM subsequently sold the ESAS Equipment at below-market cost directly to a third party in violation of the IRA Agreement. On August 26, 2005, VDV filed this lawsuit in Texas state court for (1) breach of the IRA Agreement's covenant not to compete; (2) tortious interference with prospective business relations; and (3) misappropriation of trade secrets. On September 22, 2005, the case was removed to federal court on the basis of diversity jurisdiction.

***1** RELM now asks the Court to order mandatory arbitration under the Federal Arbitration Act for each of VDV's claims.

II. ANALYSIS

***1** Under the Federal Arbitration Act, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When parties have agreed to arbitrate, federal policy strongly supports enforcement of such agreements. *Neal v. Hardee's Food Sys., Inc.,* 918 F.2d 34, 37 (5th Cir.1990); *Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 338 (5th Cir.1984); *Hawk v. Spaghetti Warehouse Restaurants, Inc.,* 2003 WL 21246138, *2 (N.D.Tex.2003).

***1** To determine whether arbitration should be compelled, the Court must determine: (1) whether the parties agreed to arbitrate the dispute; and (2) if so, whether any federal statute or policy renders the claim non-arbitrable. *Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429 (5th Cir.2004). In this case, Plaintiff VDV does not argue that federal law or policy precludes arbitration. It is equally undisputed that the parties contracted in the IRA Agreement to arbitrate disputes "arising [ ]under" the Agreement.[FN1] *See* Def's.App. at 0019 (IRA Agr. § 15). The sole issue is whether the scope of this narrow arbitration clause encompasses some or all of Plaintiff's claims. *See* *Pennzoil Exploration and Prod. Co. v. Ramco Energy, Ltd.,* 139 F.3d 1061, 1067 (5th Cir.1998) (distinguishing "narrow" clauses requiring arbitration for claims "arising under" a contract, from "broad" clauses using language such as "related to" or "involving" a contract). Each claim is examined in turn.

FN1. The arbitration clause reads, in relevant part: "The parties agree that any disputes or questions arising hereunder including the construction or application of the Agreement shall be settled by arbitration in Florida and in accordance with the rules of the American Arbitration Association." IRA Agr. § 15.

A. *Breach of Covenant Not to Compete*

*2 Plaintiff's claim for breach of contract is based on RELM's alleged violation of the IRA Agreement's covenant not to compete. *See* IRA Agr. § 11. An alleged breach of the IRA Agreement is a claim clearly and indisputably "arising under" the Agreement and is thus subject to the Agreement's arbitration clause.[FN2] *See Coffman v. Provost 7 Umphrey Law Firm,* 161 F.Supp.2d 720, 726 (E.D.Tex.2001), *aff'd,* 33 Fed. Appx. 705 (5th Cir.), *cert. denied,* 537 U.S. 880, 123 S.Ct. 89, 154 L.Ed.2d 136 (2002). Plaintiff's cause of action for breach of contract is therefore referred to mandatory arbitration.

FN2. In its Response, Plaintiff does not address arbitrability of the contract claim and therefore impliedly and appropriately concedes the issue.

B. *Tortious Interference with Prospective Contract*

*2 Plaintiff's second cause of action is for tortious interference with a prospective business relationship. RELM's sale of the ESAS Equipment to a third party allegedly interfered with Plaintiff's sale of the same equipment to the same party, with whom Plaintiff claims it was negotiating.

*2 When determining whether a tort claim falls within the scope of an arbitration clause, the district court must focus on the factual allegations in the complaint, not on the nominal characterization of the legal cause of action. *Harvey v. Joyce,* 199 F.3d 790, 795 (5th Cir.2000). Even "narrow" arbitration clauses may encompass claims other than for breach of contract. *See id.; Coffman,* 161 F.Supp.2d at 730. The test in this Circuit for applying a contract's narrow arbitration clause to a tort claim is whether the tort is "so interwoven with the contract that it could not stand alone." *Ford v. NYLCare Health Plans of Gulf Coast, Inc.,* 141 F.3d 243, 250 (5th Cir.1998).[FN3]

FN3. Although *Ford* was decided under the Texas General Arbitration Act, rather than under federal law, the court confirmed "no perceptible difference" between the standard applicable to both. *Ford,* 141 F.3d at 250 n. 7. Subsequent district courts have on that basis applied the "interwoven" test under the Federal Arbitration Act. *See, e.g., Coffman,* 161 F.Supp.2d at 730.

*2 In this case, Plaintiff's claim for tortious interference rests on precisely the same transaction that comprises its claim for breach of the IRA Agreement. Even more to the point, the IRA Agreement provides the sole basis by which Plaintiff was entitled to sell the ESAS Equipment at all. Absent the IRA Agreement, RELM can be accused of nothing more than selling its own equipment in the free market. *See Wal-Mart Stores, Inc. v. Sturges,* 52 S.W.3d 711, 726-27 (Tex.2001) (holding that when two parties are competing for a business interest to which neither has superior entitlement, a cause of action for tortious interference cannot arise from merely competitive conduct, even if that conduct is "unfair"). It is the IRA Agreement itself that transforms the sale into a potentially tortious act. For that reason, Plaintiff's claim is interwoven with and arises, if at all, under the IRA Agreement. Like the claim for breach of contract, the claim for tortious interference with prospective business relationship is subject to arbitration.

C. *Misappropriation of Trade Secrets*

*2 In the third and final cause of action, Plaintiff alleges that RELM misappropriated Plaintiff's trade secrets. Specifically, Plaintiff asserts that RELM wrongfully disclosed Plaintiff's confidential cost information to the third party with whom they both were allegedly negotiating the ESAS Equipment sale. This claim, too, is interwoven with the contract at issue.

*3 In the IRA Agreement, the parties included a clause requiring nondisclosure of each other's "Intellectual Property, any trade secrets and confidential and proprietary information." Def.'s App. at 0018 (IRA Agr. § 12). Plaintiff's claim for "misappropriation of trade secrets" is therefore nothing more nor less than an additional ground for breach of the IRA Agreement. As such it clearly "arises under" the contract and is subject to arbitration.

*3 In opposition, Plaintiff argues that its trade secret claim would lie even in the absence of the IRA Agreement and thus "stands alone." *See* Ford, 141 F.3d at 250. A duty not to reveal another party's business information, however, does not arise in a vacuum.[FN4] Under law so settled as to be axiomatic, the owner of a trade secret "will lose his secret by its disclosure unless it is done in some manner by which he creates a duty and places it on the other party not to further disclose or use it in violation of that duty." *Furr's, Inc. v. United Specialty Advert. Co.*, 385 S.W.2d 456, 459 (Tex.Civ.App.-El Paso 1964, writ ref'd n.r.e.), *cert. denied,* 382 U.S. 824, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965). In the absence here of the IRA Agreement, RELM had no duty to keep secret the cost information that Plaintiff divulged. Plaintiff's claim is therefore interwoven with the IRA Agreement and arises, if at all, under its terms.

FN4. Plaintiff's argument to the contrary is misplaced. In the line of cases on which Plaintiff relies, the duty not to disclose trade secrets arises from the presence of an employment relationship, not present in this case. *See, e.g., Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 858 (Tex.App.-Ft. Worth 2003, no writ).

*3 A final issue, though not expressly raised in Plaintiff's Response, requires consideration. In Plaintiff's Original Petition, the cause of action for revealing trade secrets is predicated not on the IRA Agreement but rather on a previous contract between the parties, a nondisclosure agreement executed in February 2003 ["Nondisclosure Agreement"]. The Nondisclosure Agreement contained no arbitration clause; thus, its violation would not be arbitrable. The Court finds, however, that the Nondisclosure Agreement was expressly merged into and superceded by the IRA Agreement. *See* Def.'s App. at 0019 (IRA Agr. § 14) ("RELM and VDV each agree to adhere to the terms and conditions of the Nondisclosure Agreement between the companies dated February 20, 2003."); Def.'s App. at 0019 (IRA Agr. § 16) ("This Agreement contains the entire understanding and agreement of the parties with respect to this subject matter set forth herein, superseding any and all prior agreements, written and oral, between the parties regarding the same subject matter."); *see also* *Coffman*, 161 F.Supp.2d at 728 (discussing and enforcing in the arbitration context a similar integration clause). The allegedly wrongful disclosure of Plaintiff's confidential information occurred after the Nondisclosure Agreement was extinguished; and thus the IRA Agreement, with its arbitration clause, applies to the trade secrets dispute. *Cf. id.* (applying the arbitration clause of a superceded contract to a claim arising before the new integrated contract took effect).

*3 Accordingly, Plaintiff's claim for misappropriation of trade secrets arises under the IRA Agreement and is subject to arbitration by its terms.

D. *Stay Pending Arbitration*

*4 In its motion, Defendant requests a stay of these proceedings pending arbitration. Because all of Plaintiff's claims are subject to arbitration, the Court instead dismisses the case. *See* *Saturn Distrib. Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 686-87 (5th Cir.2003) (discussing dismissal versus stay of a lawsuit when most or all claims are referred to arbitration).

III. CONCLUSION

*4 For the reasons given above, Defendant RELM's motion to compel arbitration is GRANTED. The Parties are hereby ORDERED to proceed to arbitration in accordance with the terms of the Independent Representative and Assumption Agreement of December 23, 2003.

*4 Because no claims remain before the Court, this case is DISMISSED WITHOUT PREJUDICE.

*4 SO ORDERED.

N.D.Tex.,2006.
VDV Media Corp. v. Relm Wireless, Inc.
Not Reported in F.Supp.2d, 2006 WL 462436 (N.D.Tex.)

Briefs and Other Related Documents (Back to top)

• 2005 WL 3720487 (Trial Motion, Memorandum and Affidavit) Relm Wireless, Inc.'s Motion to Compel Arbitration, Motion to Abate, and Brief in Support (Nov. 10, 2005) Original Image of this Document (PDF)
• 3:05cv01877 (Docket) (Sep. 22, 2005)

END OF DOCUMENT

Exhibit 3

H

Briefs and Other Related Documents

FCI USA v. Tyco Electronics Corp.E.D.Tex.,2006.Only the Westlaw citation is currently available.

United States District Court,E.D. Texas,Marshall Division.

FCI USA, INC. and FCI Americas Technology, Inc., Plaintiffs,

v.

TYCO ELECTRONICS CORPORATION, Defendant.

Civil Action No. 2:06-CV-128 (TJW).

July 18, 2006.

Otis W. Carroll, Jr., Ireland Carroll & Kelley, Tyler, TX, for Plaintiffs.
Michael Edwin Jones, Potter Minton PC, Tyler, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

T. JOHN WARD, District Judge.

*1 Before the Court is Tyco Electronics Corporation's ("Tyco") Motion to Dismiss FCI's trade secret claims and compel arbitration. Having carefully considered the parties' written submissions, the Court GRANTS the motion in part with respect to compelling arbitration and DENIES the motion in part with respect to dismissing the claims. The Court will stay FCI's trade secret claims pending the completion of the arbitration.

I. BACKGROUND

*1 In this case, FCI sued one of its competitors, Tyco, claiming patent infringement of U.S. Patent Nos. 6,976,886, 6,988,982, and 6,944,569. FCI also asserts federal and common law claims for trade secret misappropriation, unfair competition, and trademark infringement.

*1 On August 30, 2002, Tyco and FCI entered into a "Strategic Alliance Agreement" ("Agreement"), that set forth terms whereby the two companies were to combine skills and efforts to introduce new Mezzanine and Backplane products to market. The Agreement contains various sections including, *inter alia,* the duties and responsibilities of each party for patentable joint inventions, liability limitations, licensing limitations, marketing requirements, and fees paid by the parties. The contract also has an arbitration clause-the focus of this motion-that provides:

*1 If a dispute arises with respect to a matter involving a term of this Agreement or as specifically proscribed elsewhere in this Agreement, the parties agree to submit the dispute to a sole mediator selected by the parties or, at any time at the option of a party, to mediation by the American Arbitration Association ("AAA"). If not thus resolved, it shall be referred to a sole neutral arbitrator selected by the parties within thirty (30) days of the mediation, or in the absence of such selection to AAA arbitration which shall be governed by the Federal Arbitration Act.

*1 Also relevant is a section of the agreement titled "Confidential Information" that contains the varied responsibilities of the parties with respect to information exchange. Clause B of the "Confidential Information" section reads: "The parties understand and agree that any Confidential Information is to be used by the receiving party only in its performance of this Agreement ... [.]"

*1 Tyco now moves to dismiss FCI's misappropriation of trade secret claims in this case and compel arbitration per the arbitration clause in the Agreement. FCI asserts that because the trade secret claims are tort claims, they fall outside the scope of the arbitration agreement. For the reasons discussed below, the Court agrees with Tyco.

II. APPLICABLE LAW

*1 Under the Federal Arbitration Act, arbitration agreements are "valid, irrevocable, and enforceable" unless there are grounds to revoke the contract. 9 U.S.C. § 2. There is a strong federal policy favoring arbitration. *Neal v. Hardee's Food Sys., Inc.,* 918 F.2d 34, 37 (5th Cir.1990). When deciding whether to compel arbitration, the Court must decide whether the arbitration agreement is valid, and if the dispute in question falls within the scope of the agreement. *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.,* 139 F.3d 1061 (5th Cir.1998). The Supreme Court has held that arbitration clauses should be enforced unless it can be stated "with positive assurance" that the arbitration clause does not cover the dispute. *AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 650 (1986). The parties do not disagree that the arbitration clause in the Agreement is valid. Thus, this Court need only consider whether the trade secret claims fall within the scope of the arbitration clause.

*2 When a court compels arbitration of claims, the Federal Arbitration Act provides for a stay of those claims. 9 U.S.C. § 3 (2006). The Court can, however, at its discretion dismiss the claims. *See Fedmet Corp. v. M/V Buyalyk.*, 194 F.3d 674, 676 (5th Cir.1999).

III. TRADE SECRET CLAIMS WITHIN THE SCOPE OF THE AGREEMENT

*2 FCI argues the arbitration clause is of limited scope because it applies only to claims "involving a term" of the Agreement. FCI also contends that because the misappropriation of trade secrets claim is a tort, it falls outside of the scope the arbitration agreement. To support its position, FCI relies on *Tracer Research Corp. v. National Envtl. Servs. Co.*, 42 F.3d 1292 (9th Cir.1994) and *Strick Corp. v. Cravens Homallowy (Sheffield) Ltd.*, 352 F.Supp. 844 (E.D.Pa.1972). FCI's reliance on these cases is misplaced.

*2 In *Tracer* the Court analyzed whether a misappropriation of trade secrets claim was within the scope of an arbitration clause in a licensing agreement between the plaintiff and defendant. *Tracer*, F.3d at 1295. The Court held that the misappropriation of trade secrets claim did not involve the contract at all, and the alleged tort occurred after termination of the agreement. *Id.*

*2 The *Strick* Court was also dealing with an arbitration clause in a licensing agreement. *Strick*, 352 F.Supp. at 845. The Court held the narrow arbitration clause subjecting disputes "arising between the parties.. concerning the ... performance of [the] agreement" in the agreement did not govern *all* disputes between them. *Id.* at 847-48. The plaintiff's tort claim was not related to the licensing contract, therefore was not within the scope of the arbitration agreement. *Id.*

*2 The case at bar is different from both *Strick* and *Tracer*. Here, the parties agreed to a strategic relationship and contracted for the responsibilities and duties of each party in the relationship. It is therefore of a different character than a bare bones licensing agreement.

*2 Moreover, the Fifth Circuit has specifically addressed when tort claims are covered by arbitration agreements. *See Harvey v. Joyce*, 199 F.3d 790, 795 (5th Cir.2000); *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250 (5th Cir.1998). The Court's inquiry "is not guided by the legal labels attached to the plaintiffs' claims; rather, it is guided by the factual allegations underlying those claims." *Harvey*, 199 F.3d at 795. The test in the Fifth Circuit to determine if a tort claim is covered by an arbitration agreement in a contract is whether the tort is "so interwoven with the contract that it could not stand alone." *Ford*, 141 F.3d at 250.

*2 In the Agreement before this Court, the parties included a clause that covered the use of confidential information exchanged. Thus, the plaintiff's misappropriation of trade secrets claim can be reduced to an additional ground for breach of the contract. Because the use of confidential information was a term of the contract, the misappropriation of trade secrets based on information received during the relationship governed by the contract "involv [es] a term" of the contract within the scope of the Arbitration Clause. Further, following the test by the Fifth Circuit, because the relationship set forth in the contract gives rise to the claims, the claims are "so interwoven with the contract that [they can] not stand alone."

IV. DISMISSAL OF THE TRADE SECRET CLAIMS

*3 Tyco argues that if the Court refers the trade secret claims to arbitration, the claims should be dismissed. FCI disagrees and argues the FAA requires the Court to stay the claims. The Court can either dismiss the claims or stay the claims at its discretion. *See Saturn Distrib. Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 686-87 (5th Cir.2003) (discussing that the court may dismiss claims, rather than stay claims, when most or all of the claims in a suit are referred to arbitration.) In the instant case, because the misappropriation of trade secret claims are only part of a much larger lawsuit, the Court finds that staying the trade secret claims is more appropriate than dismissal.

V. CONCLUSION

***3** The Court GRANTS IN PART FCI's motion to compel arbitration. However, because the claims are merely a part of a larger law suit, and staying the claims is more appropriate than dismissing them, the Court DENIES the motion with respect to dismissing the claims. All claims other than the misappropriation of trade secrets claim in the lawsuit may proceed. The alternative motion for a more definite statement of the misappropriation of trade secrets claim is DENIED as moot.

E.D.Tex.,2006.
FCI USA v. Tyco Electronics Corp.
Slip Copy, 2006 WL 2037557 (E.D.Tex.)

Briefs and Other Related Documents (Back to top)

- 2:06cv00128 (Docket) (Mar. 29, 2006)

END OF DOCUMENT

Exhibit 4

H

Briefs and Other Related Documents

Ascension Orthopedics, Inc. v. Curasan AGW.D.Tex.,2006.Only the Westlaw citation is currently available.

United States District Court,W.D. Texas,Austin Division.

ASCENSION ORTHOPEDICS, INC.,

v.

CURASAN AG.

No. A-06-CA-424 LY.

Sept. 20, 2006.

Breck Harrison, Christopher Ramirez Mugica, Jackson Walker L.L.P., Austin, TX, for Ascension Orthopedics, Inc.

Kenneth A. Hill, Michael J. Quilling, Quilling, Selander, Cummiskey & Lownds, P.C., Dallas, TX, Paul T. Flick, Jordan Price Wall Gray Jones & Carlton, PLLC, Raleigh, NC, for Curasan AG.

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

ANDREW W. AUSTIN, Magistrate Judge.

*1 TO: THE HONORABLE LEE YEAKEL UNITED STATES DISTRICT JUDGE.

*1 Before the Court are: Defendant's Motion to Dismiss and Motion to Compel Arbitration filed on June 21, 2006 (Clerk's Docket No. 12); Plaintiff's Response filed on July 3, 2006 (Clerk's Docket No. 16); and Defendant's Reply filed on July 14, 2006 (Clerk's Docket No. 18). Furthermore, as the Court requested supplemental briefing on the applicability of the Federal Arbitration Act (FAA) and *Buckeye Check Cashing, Inc. v. Cardegna,* 126 S.Ct. 1204 (2006), Defendant's Supplemental Brief (Clerk's Docket No. 22) and Plaintiff's Supplemental Brief (Clerk's Docket No. 22) are also before the Court.

*1 The Magistrate Court submits this Report and Recommendation to the United States District Court pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

I. GENERAL BACKGROUND

*1 On June 11, 2004, curasan AG ("Supplier") and Ascension Orthopedics ("Distributor") entered into an International Distribution and Marketing Agreement (IDMA) whereby Supplier granted Distributor exclusive distribution and marketing rights over its Cerasorb bone regeneration material for the territory of the United States of America. Provisions of the IDMA are copied below in pertinent part:

*1 Section XIII-1.Governing Law: Jurisdiction. "[The] rights and obligations [under the IDMA] shall be governed and construed under the laws of Texas without reference to conflicts of laws principles."

*1 Section XIII-2. Arbitration. "All disputes and controversies relating to the interpretation and performance of this Agreement that cannot be resolved by amicable negotiation shall be resolved by arbitration.... If a claim is initiated by Supplier, arbitration shall be held in Houston, TX, U.S.A. in accordance with the rules of the American Arbitration Association."

*1 Section XIII-7 Severability. "[If a court of competent jurisdiction decides that any portion of this agreement is invalid] the remainder of this agreement shall remain in full force and effect and bind the parties according to its terms."

*1 Section XIII-8 Entire Agreement. "This Agreement set forth the entire agreement and understanding of the parties relating to the subject matter hereof and merges all prior discussions between them."

*1 In accordance with the arbitration clause, curasan initiated an arbitration proceeding against Ascension on May 18, 2006. On May 24, 2006, Ascension commenced a civil lawsuit against curasan in the 200th Judicial District Court for Travis County, Texas. On June 6, 2006, curasan removed this action under 28 U.S.C. § 1332 because the amount in controversy exceeds the sum of $75,000 and because it is a dispute between a citizen of Texas (Ascension Orthopedics, Inc-Incorporated in Deleware with its principle office in Austin, Texas) and a citizen of a foreign state (curasan AG-a citizen of Germany). curasan AG now requests this court to dismiss this action and compel arbitration. Accordingly, this Court must determine (1) whether a valid arbitration agreement exists, and (2) whether the dispute in question is within the scope of that agreement.

II. CHOICE OF LAW

*2 The IDMA expressly provides that Texas law shall apply when the dispute is initiated by Supplier. IDMA at Section XIII.1. Furthermore, the IDMA calls for arbitration in Houston, Texas if it is initiated by the Supplier. IDMA at Section XIII.2. The issue of whether the parties are bound by an arbitration clause is determined by state law principles of contract law. *First Options, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995); *American Rlty. Trust, Inc. v. JDN Real Estate-McKinney, L.P.,* 74 S.W.3d 527, 531 (Tex.App.-Dallas 2002, pet. denied). Therefore, the Court will use Texas law in determining the validity and scope of the agreement. Nonetheless, because the Fifth Circuit has held that where, as here, an agreement designates Texas law "but does not exclude the FAA, the FAA and Texas law, including that state's arbitration law, apply concurrently because Texas law incorporates the FAA as part of the substantive law of that state." *Freudensprung v. Offshore Technical Servs., Inc.,* 379 F.3d 327, 338 at n. 7 (5th Cir.2004).

*2 The Fifth Circuit has established a four part test in applying Chapter 2 of the FAA, also known as The Convention on the Recognition and Enforcement of Arbitral Awards.FN1 Chapter 2 applies if: 1) there is a written agreement to arbitrate the dispute; 2) the agreement provides for arbitration in the territory of a Convention signatory; 3) the agreement to arbitrate arises out of a commercial legal relationship; and 4) a party to the agreement is not an American citizen. *Sedco v. Petroles Mexicanos Mexican Nat'l Oil Co.,* 767 F.2d 1140, 1144-45 (5th Cir.1985). In the present case there is a written arbitration agreement, both Germany and the USA are signatories to the Convention, the arbitration forum is Texas as Supplier initiated arbitration, the agreement arises out of a commercial legal relationship, and curasan is not an American citizen. Therefore, the Court will apply Texas law as well as the FAA and applicable legal precedent.

FN1. Chapter 2 of the FAA applies not only to the recognition and enforcement of awards, but also to the recognition and enforcement of *agreements* to arbitrate in the first place. 9 U.S.C Title 1, Chapter 2, Section 202.

III. ANALYSIS

*2 In reviewing Ascension's Motion to Dismiss and Compel Arbitration the Court must consider the: 1) validity and 2) scope of the arbitration agreement in the IDMA. Ascension must carry the burden of proving the existence of a valid agreement to arbitrate between the parties, and that the claims are within the scope of the arbitration agreement. *In re Oakwood Mobile Homes, Inc.* 987 S.W .2d 571, 573 (Tex.1999). Under both Texas law and the FAA, once a party establishes that there is a valid agreement to arbitrate and that the causes of action raised in the lawsuit are within the scope of the arbitration clause, the Court must compel arbitration unless it finds the agreement is null and void, inoperative, or incapable of being performed.. Tex. Civ. Prac. & Rem.Code § § 171.021 and 171.025, *Cantella & Co., Inc. v. Goodwin,* 924 S.W.2d 943, 944 (Tex.1996), Federal Arbitration Act, 9 U.S.C. § 1, *et seq., Sedco v. Petroles Mexicanos Mexican Nat'l Oil Co.,* 767 F.2d 1140, 1144-45 (5th Cir.1985). Therefore this Court's inquiry is limited to the validity and scope of the arbitration agreement in the IDMA.

A. Validity of the Agreement

*3 Challenges to arbitration agreements can be divided into two categories: 1) challenges to the validity of the arbitration agreement itself; and 2) challenges to the validity of the contract as a whole, "either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye,* 126 S.Ct. At 1208. Notably absent from Ascension's brief is a claim of fraud in the inducement of the arbitration provision within the IDMA (Section XIII.2). Instead its claims are limited to an attack on the IDMA as a whole. This failure is of note because "if the claim is fraud in the inducement of the arbitration clause itself-an issue which goes to the making of the agreement to arbitrate-the federal court may proceed to adjudicate it." *Buckeye,* 126 U.S. at 1208 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967)). However, the Court "may not consider claims of fraud in the inducement of the contract generally." *Id.* Ascension's claims are limited to fraud in the inducement of the contract generally.

*3 Therefore, because of the separate enforceability of an arbitration provision "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole" (as in this case) "must go to the arbitrator." *Id.* at 1210. Accordingly, this Court must defer to the arbitrator in deciding the validity of the contract. Nonetheless, this Court does review whether the claims asserted are within the scope of the agreement and will now turn to that issue.

B. Scope of the Agreement

*3 Before turning to an analysis of the scope of the agreement the Court reviews Ascensions's claims by reference to its pleadings. Ascension seeks to recover damages and equitable relief for harm sustained as a result of curasan's fraud, misrepresentations and deceptive acts and practices, and in reliance upon false statements and conduct that induced Ascension to enter into the IDMA agreement. (Plaintiff's Original Complaint at § § 5-8). Therefore, the Court will analyze whether these actions are within the scope of the arbitration agreement in the IDMA in accord with the Supreme Court's instruction to "determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In determining whether these claims fall within the scope of the arbitration agreement, the Court will look at the terms of the parties' agreement and the factual allegations in the petition. *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex.1995). Furthermore, the Court bears in mind that any doubt about the scope of an arbitration clause must be resolved in favor of arbitration and that the Court should enforce an arbitration clause unless it can be said with "positive assurance" that the clause is not susceptible to an interpretation that covers the dispute. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex.2001), *Gerwell v. Moran*, 10 S.W.3d 28, 33 (Tex.App.-San Antonio 1999, no pet.). Additionally, the mere pleading of tort claims does not preclude the application of the arbitration clause so long as the claims "touch upon" matters covered by the written contract containing the arbitration clause. *In re Bruce Terminex Co.*, 988 S.W.2d 702, 703, 706 (Tex.1998) (per curiam).

*4 In spite of plaintiff's claims that the causes of actions are independent of the contract and outside the scope of the arbitration agreement, plaintiff's original complaint undermines this very argument. For instance, plaintiff alleges damages stemming from its "efforts to market and distribute Cerasorb" which is its primary obligation under the IDMA. (Plaintiff's Original Petition § 4.6). Additionally, it claims losses from its "attempts to market and sell the product," both of which were contractual obligations. (*Id.* at § 4.7). Therefore, plaintiff's petition proves that which it now tries to undermine; that is, its claims, regardless of sounding in tort or contract, are "inextricably interwoven" with the relationship arising under the IDMA. FN2 *Terminex*, 988 S.W .2d at 703, 706.

FN2. Furthermore, as Defendant points out, Ascension may not avoid an arbitration clause by merely asserting fraud in the inducement of the entire contract. Instead, "allegations of fraud in the inducement of the underlying contract are matters for the arbitrator to decide." *Pepe Int'l Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925 (Tex.App.-Houston [1st District] 1996, no writ). Similarly Ascension cannot escape the arbitration clause by asserting that the actionable conduct occurred before the contract because of the merger clause in the contract. (IDMA at Section XIII.8).

*4 Plaintiff's second argument is that the Court should take a narrow reading of the arbitration clause at issue. However, neither the plaintiff nor the Court has been able to find precedent for a narrow interpretation of such a clause. Instead, both caselaw and plaintiff's allegations suggest that the claims arise directly out of the "interpretation and performance" of the agreement. For instance, plaintiff asserts that it "relied upon curasan's representations *in the performance of its obligations*" and that it "relied upon curasan's representation when it entered into the IDMA and *in the performance of its obligations thereunder.*" (Plaintiff's Original Petition at § § 5.1, 6.1). Furthermore, upon independent inquiry, the Court has found relevant jurisprudence showing that such clauses are regularly construed broadly. *See* *Mar-Len of Louisiana, Inc., v. Parsons-Gilbane*, 773 F.2d 633, 635-36 5th Cir.1985 (finding identical language to be "broad enough" and "sufficiently broad"), *see also* *Jureczki v. Banc One Texas*, 252 F.Supp.2d 368, 375 (S.D.Tx.2003) (finding that the terms "interpretation and performance" suggest a broad agreement.). Therefore, it appears that the claims at issue in this case are within the scope of the parties' agreement to arbitrate. There being no issue of validity that the Court may consider, and because the claims are within the scope of the arbitration agreement in the IDMA, it appears that arbitration is required in this case.

IV. RECOMMENDATION

***4** The Magistrate Court RECOMMENDS that the District Court GRANT Defendant's Motion to Dismiss and Compel Arbitration (Clerk's Docket No. 12).

V. WARNINGS

***4** The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *Battles v. United States Parole Comm'n,* 834 F.2d 419, 421 (5th Cir.1987).

***4** A party's failure to file written objections to the proposed findings and recommendations contained in this Report within ten (10) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. See 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140, 150-153, 106 S.Ct. 466, 472-74 (1985); *Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1428-29 (5th Cir.1996).

***5** To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation to the parties by certified mail, return receipt requested.

W.D.Tex.,2006.
Ascension Orthopedics, Inc. v. Curasan AG
Slip Copy, 2006 WL 2709058 (W.D.Tex.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 2306163 (Trial Motion, Memorandum and Affidavit) Motion to Dismiss and Compel Arbitration (Jun. 20, 2006) Original Image of this Document (PDF)
- 2006 WL 3262524 (Trial Motion, Memorandum and Affidavit) Motion To Dismiss And Compel Arbitration (Jun. 20, 2006) Original Image of this Document (PDF)
- 2006 WL 1757160 (Trial Pleading) Notice of Removal of Civil Action (Jun. 5, 2006)
- 1:06cv00424 (Docket) (Jun. 5, 2006)

END OF DOCUMENT

Exhibit 5

Briefs and Other Related Documents

Redwood Resort Properties, LLC v. Holmes Co. LimitedN.D.Tex.,2006.Only the Westlaw citation is currently available.

United States District Court,N.D. Texas,Dallas Division.

REDWOOD RESORT PROPERTIES, LLC, Plaintiff,

v.

HOLMES COMPANY LIMITED, Defendant.

Civil Action No. 3:06-CV-1022-D.

Nov. 27, 2006.

Francis B. Majorie, Majorie Firm, Dallas, TX, for Plaintiff.

John W. Turner, Kenneth E. Gardner, Susman Godfrey, Dallas, TX, for Defendant.

MEMORANDUM OPINION AND ORDER

SIDNEY A. FITZWATER, District Judge.

*1 In this removed action arising from a transaction to develop and sell real property located in the Bahamas, defendant moves to dismiss under Fed.R.Civ.P. 12(b)(6) and 9(b), presenting the questions whether plaintiff has stated claims on which relief can be granted and has pleaded fraud with particularity. For the reasons that follow, the court grants defendant's motion in part and denies it in part and allows plaintiff to replead.

I

*1 Plaintiff Redwood Resort Properties, LLC ("Redwood") and defendant Holmes Company Limited ("Holmes") entered into a letter agreement ("Letter Agreement") to work together exclusively with the intent of entering into a joint venture to develop and sell real property located on Crab Cay Island and Great Exuma, Bahamas.[FN1] The "Portfolio" consisted of Crab Cay Island, a sea bed lease for construction of a marina, and property on Great Exuma that was necessary for construction of infrastructure to support development on, and to create an entrance to, the Island. According to Redwood, after it entered into the Letter Agreement, expended substantial financial and human resources to create a development plan, and exercised an exclusive right and option to acquire an interest, and after Holmes obtained information from Redwood, Holmes announced that it was not interested in developing the property with Redwood but would do so itself. In pursuing its own interests, Holmes attempted to employ or did employ advisors whom Redwood had retained for the joint development of the project, attempted to usurp or did usurp relationships that Redwood had developed, and attempted to use or has used proprietary development plans and data that Redwood created for the joint development.

FN1. Consistent with the standards set out in more detail *infra* at § II, the court recounts the facts favorably to Redwood as the nonmovant. The court does not, however, accept legal conclusions that are disguised as factual allegations. Accordingly, to the extent the court as a matter of law has interpreted the Letter Agreement in a manner that varies from how Redwood has characterized the agreement in its pleadings, the court summarizes the facts consistently with its legal interpretation.

*1 The Letter Agreement, which contained binding and non-binding provisions, essentially divided Crab Cay Island into two parts. The first, known as the "Project," was to be developed by a venture between Redwood and Holmes (the "Venture"). The Venture involved developing a resort and a marina, a marketing and sales center, a beach club and spa, tennis courts, casitas, villas, a private club, and "hotel type" accommodations. The second, known as the "Enclave" and the reserved property, would be developed by Holmes but planned by the Venture in a manner that would complement the overall residential character of Crab Cay Island. Lots in the Enclave were to be sold in a manner that did not compete with the Venture's sales activities. Under the Letter Agreement, the Project and the Enclave developments were to be coordinated, and Redwood was responsible for creating the master development plan for coordinating the day-to-day operations of the Project within the approved budget.

*1 Although, as noted, the Letter Agreement contained non-binding provisions, ¶ ¶ 19 and 9 included enforceable obligations that applied to the parties during the due diligence period and concerned Redwood's exclusive right and option to acquire an interest in the Portfolio. Additionally, under ¶ 1, Redwood and Holmes were obligated to work together in good faith during the due diligence period, using commercially reasonable efforts to determine all necessary information related to the development and sale of the Portfolio. Due diligence included satisfactory evaluation of the financial, physical, environmental, title, zoning, and entitlement aspects of the Portfolio. Paragraph 9 provided that Redwood would promptly prepare a definitive venture agreement that would contain the terms of the Letter Agreement and other covenants, conditions, and representations satisfactory to both parties. Under ¶ 19, Redwood and Holmes were obligated to use good faith efforts to negotiate and execute a venture agreement. Paragraphs 1 and 17 required the parties to form the venture under Bahamian law as soon as practicable and to use their best efforts to consummate and effect the transactions contemplated under the Letter Agreement.

***2** Paragraph 9 also contained the parties' acknowledgment that Redwood would incur substantial expenses preparing the venture agreement and performing due diligence. The parties therefore agreed that Holmes would deal exclusively with Redwood in the development and sale of the Portfolio. Paragraph 9 explicitly gave Redwood the exclusive right and option to acquire an interest in the Portfolio under the terms and conditions of the Letter Agreement until the earlier of October 30, 2005 or the date Redwood gave Holmes written notice that it would not pursue the transaction.

***2** Redwood fully performed its obligations under the Letter Agreement. It prepared a draft venture agreement and provided it to Holmes before October 30, 2005. Redwood dedicated its own staff and hired engineers, architects, financial analyst, and other advisors ("the Advisors") to conduct due diligence and evaluate and create models for the financial, physical, environmental, zoning, and entitlement aspects of the Project. It sought involvement in the project by several hotel operators ("Hotel Operators"). Redwood's relationships with the Advisors and discussions with the Hotel Operators, and its plans, marketing data, critical path timelines, projections, and other work product constituted original, confidential formulas, patterns, devices, or compilations of information ("Proprietary Information") that gave Redwood a competitive advantage over those who do not know it or use it, and it enhanced the value of the Portfolio by millions of dollars and added to the value of the Enclave and reserved property.

***2** Redwood alleges that it exercised its exclusive option under ¶ 9 of acquiring an interest in the Portfolio, and that after it did so and began to proceed with development, Holmes began to equivocate about its interest in pursuing the Project. Holmes refused to sign the agreement that Redwood had tendered or any other document that contained changes or modifications acceptable to the parties. Holmes attended a meeting with Bahamian authorities that it had told Redwood had been cancelled. The parties disagreed over other development decisions, and Holmes eventually notified Redwood that it was proceeding in another direction. Holmes stopped discussing the Project with Redwood, started contacting Redwood's Advisors to work directly for Holmes, and began trying to steal the Project.

***2** Redwood filed suit in Texas state court, asserting claims for (1) breach of contract, (2) breach of fiduciary duty, (3) unjust enrichment/quantum meruit/money had and received, (4) misrepresentation, (5) misappropriation of trade secrets; (6) aiding and abetting, (7) tortious interference, and (8) interpleader. Holmes removed the case to this court on the basis of diversity of citizenship. It now moves to dismiss Redwood's complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted and under Rule 9(b) for failure to plead fraud with specificity.

II

***3** In deciding Holmes's 12(b)(6) motion, the court construes Redwood's complaint FN2 in the light most favorable to it, accepts as true all well-pleaded factual allegations, and draws all reasonable inferences in its favor. *See, e.g., Lovick v. Ritemoney Ltd.,* 378 F.3d 433, 437 (5th Cir.2004). "The court does not, however, 'rely upon conclusional allegations or legal conclusions that are disguised as factual allegations.' " *Jackson v. Fed. Express Corp.,* 2006 WL 680471, at *14 (N.D.Tex. Mar. 14, 2006) (Fitzwater, J.) (quoting *Jeanmarie v. United States,* 242 F.3d 600, 602-03 (5th Cir.2001)). "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [its] claim." *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir.2000) (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir.1993)).FN3

FN2. Because Redwood brought suit in state court, it filed a "petition" rather than a "complaint." The court will refer to the pleading as Redwood's "complaint."

FN3. Redwood does not object to the court's consideration of the content of the Letter Agreement in deciding this motion. *See* P. Br. 12 n. 17.

*3 "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982) (quoting Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 598 (1969)). "[D]ismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate." *Id.* (internal quotation marks omitted). "The court may dismiss a claim when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir.1999) (per curiam) (Rule 12(c) decision).

III

*3 Holmes first moves to dismiss Redwood's breach of contract claim.

A

*3 Redwood alleges that Holmes breached the Letter Agreement by (1) failing to work with Redwood in good faith concerning the due diligence and development plan for the Project; (2) failing to execute and/or work with Redwood in good faith concerning the venture agreement and/or to form a Bahamian entity; (3) failing to recognize and/or repudiating Redwood's interest in the Portfolio, as vested by its exercise of the exclusive right and option to acquire an interest; (4) attempting to and/or actually engaging Redwood's Advisors to work on the Project; and (5) using the Proprietary Information for its own benefit rather than for the benefit of Redwood or a Bahamian entity jointly owned by Redwood and Holmes.

*3 Holmes maintains that Redwood cannot state a breach of contract claim on which relief can be granted because ¶ 19 of the Letter Agreement establishes unequivocally that no binding terms exist for the development of Crab Cay Island without a final executed venture agreement; Redwood's interpretation of the exclusivity provision of ¶ 9 is facially unreasonable and would render ¶ 19 meaningless; Redwood has failed to allege that it properly exercised any exclusivity option; the complaint and Letter Agreement show that there was no meeting of the minds, consent to terms, or mutual assent to be bound; Redwood cannot state a claim for breach of a duty to negotiate in good faith; and Redwood's remaining breach of contract allegations are insufficient as a matter of law.

B

*4 The court will consider together Holmes's related contentions that, under ¶ 19 of the Letter Agreement, there were no binding terms for developing Crab Cay Island without an executed venture agreement and that Redwood's interpretation of the exclusivity provision of ¶ 9 is facially unreasonable and would render ¶ 19 meaningless. Holmes argues that because the parties never executed a final venture agreement, no contract terms for developing Crab Cay Island became enforceable and, specifically, that Redwood did not acquire a vested interest in the Portfolio. It maintains that ¶ 9 cannot reasonably be read to grant Redwood the exclusive right and option to acquire an interest in the Portfolio without agreeing with Holmes on the final terms of the venture and entering into a venture agreement.

*4 As a threshold matter, the court observes that these arguments-while in many ways pertinent to the heart of the parties' dispute-do not appear to address Redwood's first and second grounds for alleging breach of contract: that Holmes failed to work with Redwood in good faith concerning the due diligence and development plan for the Project, and that Holmes failed to execute and/or work with Redwood in good faith concerning the venture agreement and/or to form a Bahamian entity. Holmes recognizes that the provisions of the Letter Agreement that related to the parties' responsibilities during the due diligence period or as part of the negotiation process were binding and enforceable. *See* D. Br. 9, 11. These components of Redwood's breach of contract claim, viewed favorably to Redwood, appear to relate to Holmes's obligations during the due diligence period and negotiation process.FN4 The court will therefore consider Holmes's contentions in determining whether the third, fourth, and fifth components of Redwood's breach of contract action fail to state a claim on which relief can be granted.

FN4. This view of Holmes's motion is corroborated by analyzing other arguments that Holmes makes that *do* appear to address the first and second grounds of Redwood's breach of contract claim. *See infra* § III(C) and (D).

*4 To decide the merits of these grounds of Holmes's motion, the court must interpret the Letter Agreement. The court can consider the contents of the Letter Agreement even though the document has been submitted with Redwood's motion. Collins, 224 F.3d at 498-99. The court does not accept as true legal conclusions pleaded in Redwood's complaint that are disguised as factual allegations. *Jackson*, 2006 WL 680471, at *14. Therefore, the court may interpret the Letter Agreement as a matter of law at the Rule 12(b)(6) stage and apply that interpretation in deciding Holmes's motion, even though Redwood has offered a different characterization of the Letter Agreement in its complaint.
*4 Under Texas law, the court's primary concern when interpreting a contract is to ascertain the parties' true intentions as expressed in the instrument. To achieve this objective, the court should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. Language should be given its plain and grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated. Where the contract can be given a definite legal meaning or interpretation, it is not ambiguous and the court will construe it as a matter of law. A contractual provision is ambiguous when its meaning is uncertain and doubtful or if it is reasonably susceptible to more than one interpretation. Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.

*5 *Bank One, Texas, N.A. v. FDIC*, 16 F.Supp.2d 698, 707 (N.D.Tex.1998) (Fitzwater, J.) (citations omitted).

*5 Construing the Letter Agreement in its entirety, harmonizing and giving effect to all its provisions so that none is rendered meaningless, and affording the language of the agreement its plain and grammatical meaning, the court holds as a matter of law that only the limited provisions that are explicitly binding are enforceable through a breach of contract claim and that the remaining provisions are not enforceable, as here, absent execution by Redwood and Holmes of a final executed venture agreement.

*5 The Letter Agreement evinces that the parties undertook comprehensive and mutually beneficial preliminary activities that they intended could lead to a final joint venture for the development and sale of real property located on Crab Cay Island and Great Exuma, Bahamas. *See* D.App. 1. Some activities were explicitly the subject of binding and enforceable contractual provisions. The parties agreed that Redwood had the exclusive right and option under the terms of the Letter Agreement to acquire an interest in the Portfolio until the earlier of October 30, 2005 or the date it notified Holmes in writing that it would not pursue the transaction, *id.* at 5, ¶ 9; Holmes would reimburse Redwood for its third party due diligence expenses if the parties did not execute a venture agreement, *id.* at 6, ¶ 11; except as required by law or with the other party's written consent, each party would generally keep confidential all non-public information obtained in connection with the due diligence review, *id.* at 6-7, ¶ 13; public announcements of the contemplated transactions would not be made except as required by law or with the other party's consent, *id.* at 7, ¶ 14; their responsibilities during the due diligence period were enforceable, *id.* at 7, ¶ 19; and each would use good faith efforts to negotiate and execute a venture agreement, *id.*

*5 But the parties did not agree that in the Letter Agreement itself they had formed a binding and enforceable venture agreement or that Redwood could force the formation of such an agreement unilaterally under ¶ 9. Paragraph 19 specified that the provisions of the Letter Agreement were largely non-binding and that the parties had not reached a final agreement. This paragraph provided, in relevant part:
*5 Each party acknowledges that no agreement has been reached with respect to these intentions and that these intentions are under no circumstances legally binding on or enforceable against either party and neither party will assert otherwise in the absence of a fully-integrated definitive Venture Agreement that has been duly authorized, executed and delivered by all parties.

*5 D.App. 7. Other provisions corroborated the largely non-binding nature of the relationship. Paragraph 1 referred to a venture that "will be formed to develop and sell" the property. *Id.* at 1. Paragraph 11 provided that Redwood would be entitled to recover third party due diligence expenses "[i] n the event that the Venture Agreement is not executed by the parties." *Id.* at 6. Under ¶ 15, the "Letter Agreement [could] be terminated and the transaction contemplated hereby may be abandoned at any time: (a) upon the written consent of each of the Parties hereto; (b) by either Party, if the Venture Agreement has not been executed by October 30, 2005." *Id.* at 7. Several other paragraphs refer to a "contemplated" transaction. *See, e.g., id.* at 7, ¶ 16. Viewed in its entirety, the Letter Agreement reflects the parties' intentions to pursue preliminary activities that could lead to a definitive and binding venture agreement that would be executed in the future. The Letter Agreement itself, however, was not that binding venture agreement.

***6** Nor can ¶ 9 be interpreted in isolation to confer on Redwood the unilateral right to obtain an interest in the Portfolio in the absence of a final executed venture agreement or to support Redwood's claim that it had a vested interest as of October 30, 2005. Paragraph 9 provided, in relevant part:

***6** Promptly after the execution of this Agreement, Redwood will commence the preparation of a definitive venture agreement ... [that] will contain the terms set forth in this Agreement and such other covenants, conditions, and representations as will be in form and substance satisfactory to both parties.... Redwood shall have the exclusive right and option to acquire an interest in the Portfolio pursuant to the terms and conditions recited herein until the earlier to occur of (i) October 30, 2005, or (ii) the date on which Redwood shall have given written notice to Holmes that it will not pursue the transaction contemplated hereby.

***6** *Id.* at 5, ¶ 9. When ¶ 9 is read as a component of the entire Letter Agreement, it is clear that the parties intended that Redwood would have the exclusive right and option, until the earlier of October 30, 2005, or the date it notified Holmes in writing that it would not pursue the contemplated transaction, to acquire an interest in the Portfolio under the terms of the Letter Agreement. In other words, during this period Holmes could not enter into a venture agreement with anyone but Redwood or a Redwood affiliate. But ¶ 9 cannot reasonably be read to confer on Redwood the right unilaterally to effect a binding venture agreement without Holmes's consent.

***6** Accordingly, the court holds that Redwood cannot recover against Holmes for breach of contract on the basis that Holmes failed to recognize and/or repudiated Redwood's interest in the Portfolio. Nor can Redwood recover on a ground that assumes that any part of the Letter Agreement except ¶ ¶ 9, 11, 13, 14, and 19 was binding and enforceable. Because there is nothing in these paragraphs that contractually precluded Holmes from attempting to engage and/or actually engaging Redwood's Advisors to work on the Project or using the Proprietary Information for its own benefit after it paid for it, these components of Redwood's breach of contract claim must also be dismissed. [FN5] And since the court has dismissed part of Redwood's breach of contract claim on this basis, it need not consider Holmes's arguments that Redwood has failed to allege that it properly exercised any exclusivity option and that the complaint and Letter Agreement show that there was no meeting of the minds, consent to terms, or mutual assent to be bound.

FN5. In response to a footnote in Holmes's brief, Redwood asserts by way of footnote that there is a fact question whether under Texas law the non-binding provisions of the Letter Agreement became binding as a result of its partial performance. *See* P. Br. 17 n. 21. Redwood does not assert, however, that the court should deny the motion to dismiss on this basis. Because the court is granting Redwood leave to amend, Redwood can attempt to allege this as a basis for a breach of contract claim if it has adequate grounds to do so. By contrast, Redwood does rely on a theory of part performance to avoid dismissal of its quasi-contract claims. *See id.* at 21-22.

C

***6** Holmes contends that Redwood cannot state a claim for breach of a duty to negotiate in good faith because the complaint fails to allege facts that adequately assert that Holmes violated such a duty. It also posits that, under Texas law, agreements to negotiate in good faith are unenforceable as a matter of law. Holmes thus maintains that an alleged duty to negotiate in good faith cannot be the basis for a breach of contract claim.

***7** The court declines to dismiss this element of Redwood's breach of contract claim. First, Redwood does not allege that Holmes breached a duty to *negotiate* in good faith; its asserts that Holmes failed to *work with* Redwood in good faith. Compl. ¶ 58.[FN6] Holmes's reliance on Texas law that precludes reliance on a duty to negotiate in good faith [FN7] is thus misplaced. Second, viewing Redwood's complaint in the light most favorable to it, accepting as true all well-pleaded factual allegations, and drawing all reasonable inferences in its favor, the court is unable to say that Redwood can prove no set of facts in support of this component of its claim that would entitle it to relief.

FN6. At this stage of the case, the court assumes that the failure to *work with* another party in good faith is sufficiently distinct from a failure to *negotiate* in good faith as to render failure-to-negotiate cases inapposite. The court does not exclude the possibility, however, that further development of the record may show that Redwood's claim is in effect one for failure to negotiate.

FN7. *See John Wood Group USA, Inc. v. ICO, Inc.,* 26 S.W.3d 12, 21 (Tex.App.2000, pet.denied) ("[U]nder Texas law, an agreement to negotiate in the future is unenforceable, even if the agreement calls for a 'good faith effort' in the negotiations." (citing *Radford v. McNeny,* 129 Tex. 568, 104 S.W.2d 472, 474 (1937); *Maranatha Temple, Inc. v. Enter. Prods. Co.,* 893 S.W.2d 92, 104 (Tex.App.1994, writ denied))).

D

*7 Holmes argues that Redwood cannot recover for breach of contract on the following three predicate grounds because they are insufficient as a matter of law: that Holmes attempted to and/or actually engaged Redwood's Advisors to work on the Project; that Holmes failed to execute and/or work with Redwood in good faith concerning the venture agreement and/or to form a Bahamian entity; and that Holmes used the Proprietary Information for its own benefit rather than for the benefit of Redwood or a Bahamian entity jointly owned by Redwood and Holmes. In view of its decision above, *see supra* § III(B), the court need only address whether the second ground-that Holmes failed to execute and/or work with Redwood in good faith concerning the venture agreement and/or to form a Bahamian entity-is sufficient. Viewing Redwood's complaint in the light most favorable to it, accepting as true all well-pleaded factual allegations, and drawing all reasonable inferences in its favor, the court is unable to say that Redwood can prove no set of facts in support of this component of its claim that would entitle it to relief.

E

*7 Accordingly, for the reasons stated, the court holds that Redwood's breach of contract claim must be dismissed for failure to state a claim on which relief can be granted insofar as it is based on the following components: that Holmes failed to recognize and/or it repudiated Redwood's interest in the Portfolio, as vested by its exercise of the exclusive right and option to acquire an interest; that Holmes attempted to and/or actually engaged Redwood's Advisors to work on the Project; and that Holmes used the Proprietary Information for its own benefit rather than for the benefit of Redwood or a Bahamian entity jointly owned by Redwood and Holmes. The court declines to dismiss the balance of Redwood's breach of contract claim.

IV

*7 Holmes also moves to dismiss Redwood's breach of fiduciary duty claim.

A

*7 Redwood asserts that Holmes owed it a fiduciary duty and duty of trust arising out of Holmes's receipt of the Proprietary Information from Redwood in confidence, the special trust and confidence placed in Holmes by Redwood induced by the binding provisions of the Letter Agreement, and/or Redwood's exercise of the exclusive right/option to acquire an interest. To plead that Holmes breached this duty, Redwood relies on the same grounds as those on which it bases its breach of contract action. Holmes argues that the claim should be dismissed because Redwood has failed to allege facts that support the existence of a duty or the breach of the duty. Redwood responds that it has pleaded the existence of a fiduciary duty based on the possibility that Redwood and Holmes entered into a joint venture and on the basis that Redwood created Proprietary Information in confidence and that the information provided Holmes with trade secrets.

B

*8 Texas courts recognize two types of fiduciary relationships: formal and informal fiduciary relationships. Opus S. Corp. v. Limestone Constr., Inc., 2003 WL 22329033, at * 3 (N.D. Tex October 6, 2003) (Fish, C.J.). "A formal fiduciary relationship arises as a matter of law, for example, between an attorney and a client, a principal and an agent, or between partners or joint venturers." *Id.* (citing Imperial Premium Fin., Inc. v. Khoury, 129 F.3d 347, 353 (5th Cir.1997)). An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176 (Tex.1997).

*8 Redwood has failed to plead that a fiduciary relationship arose from its status as Holmes's joint venturer because, as explained *supra* at § III(B), Redwood could not effect this relationship absent a final executed venture agreement, and it is undisputed that the parties did not enter into such an agreement. Additionally, Redwood has not established that it can recover for breach of fiduciary duty on any basis except the allegation that Holmes used the Proprietary Information for its own benefit rather than for the benefit of Redwood or a Bahamian entity jointly owned by Redwood and Holmes.

*8 Holmes does not dispute that a duty not to disclose confidential or proprietary information can arise from a confidential relationship. Instead, it maintains that Redwood has failed to allege when or how it breached any duty of confidentiality on this basis. *See* D. Reply Br. 7. Viewing Redwood's complaint in the light most favorable to it, accepting as true all well-pleaded factual allegations, and drawing all reasonable inferences in its favor, the court is unable to say that Redwood can prove no set of facts in support of this basis for its breach of fiduciary duty claim that would entitle it to relief. Accordingly, the court dismisses Redwood's breach of fiduciary duty claim to the extent based on any predicate other than that Holmes used the Proprietary Information for its own benefit rather than for the benefit of Redwood or a Bahamian entity jointly owned by Redwood and Holmes. The court denies otherwise denies the motion.

V

*8 Holmes moves to dismiss Redwood's quasi-contractual claims for quantum meruit, unjust enrichment, and money had and received.

A

*8 Redwood alleges that, if the court concludes that there was no valid contract between Redwood and Holmes, it should hold that Holmes's acts and omissions "render it unjust, unconscionable, and/or unfair for [Holmes] to keep all of the profits flowing from a development of the Portfolio, to the exclusion of [Redwood]." Compl. ¶ 68. Holmes maintains that, if there is no contract to develop Crab Cay Island, it owed no duty to Redwood to give it any of the profits; to the extent Redwood seeks reimbursement of its due diligence costs, the enforceable provisions of the Letter Agreement cover this subject and Redwood concedes in its complaint that Holmes has already paid the agreed reimbursement; and the enforceable provisions of the Letter Agreement cover the subject matter of and thus negate Redwood's quasi-contract claims. Holmes also posits that a claim for unjust enrichment is not an independent cause of action, and that Redwood cannot recover for money had and received because it has not alleged that Holmes holds money that belongs to Redwood but at most alleges that it is entitled to future profits from the Project. Redwood acknowledges the general rule that a party cannot recover for quasi-contract where a contract governs, but it maintains that it is conceivable that it could recover on this basis, and it argues that there is an exception to this rule when one party partly performs but the other party's material breaches prevent completion of the contract.

B

1

*9 The court dismisses Redwood's claim for unjust enrichment. Unjust enrichment "is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay." Doss v. Homecoming Fin. Network, Inc., ---S.W.3d ----, 2006 WL 3093631, at *2 n. 4 (Tex.App. Nov. 2, 2006, no pet. h .) (citing City of Corpus Christi v. Heldenfels Bros., 802 S.W.2d 35, 40 (Tex.App.1990), *aff'd*, 832 S.W.2d 39 (Tex.1992)). Accordingly, the court holds that Redwood has failed to state an unjust enrichment claim on which relief can be granted, and it dismisses this action.

2

*9 The court is unable to dismiss Redwood's quantum meruit claim. Holmes maintains that, if there is no contract to develop Crab Cay Island, it owed no duty to Redwood to give it any of the profits. This argument is inadequate to support dismissal.
*9 To recover on a claim of quantum meruit, a claimant must prove that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged.

*9 *Tricon Tool & Supply, Inc. v. Thumann*, --- S.W.3d ----, 2006 WL 3316993, at *4 (Tex.App. Nov. 16, 2006, no pet. h.) (internal quotation marks omitted) (quoting *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex.1990)). Redwood alleges in support of this claim that it conferred substantial benefits on Holmes in connection with the development of the Project. *See* Compl. ¶ 69. The court is unable to say that Redwood can prove no set of facts in support of this claim that would entitle it to relief. FN8

FN8. Redwood asserts two paragraphs later that it is seeking Holmes's profits, *see* Compl. ¶ 71, which may undermine its quantum meruit claim in that the measure of damages it seeks does not appear to correspond to a claim for which relief is measured by the value of the services rendered. In its motion, Holmes at least inferentially notes this potential problem by pointing out that Redwood seeks to recover lost profits. At the Rule 12(b)(6) stage, however, the court will construe Redwood's complaint favorably to allege a quantum meruit claim on which relief can be granted.

*9 Nor can the court dismiss the claim based on the scope of the Letter Agreement. The "substantial benefits" that Redwood has pleaded conceivably relate to parts of the parties' relationship that were not covered by an enforceable provision of the Letter Agreement. For example, Holmes relies on ¶ 11 of the Letter Agreement to argue that the subject matter of Redwood's claim is covered. It is possible under the pleadings that the benefit that Redwood conferred on Holmes extends beyond the due diligence efforts governed by ¶ 11. The court is therefore unable to say that there is no set of facts that would permit Redwood to recover for quantum meruit, and it denies the motion to dismiss in this respect.

3

*9 The court is also unable to say that Redwood's action for money had and received must be dismissed in its entirety.

*9 First, as with Redwood's quantum meruit claim, this action may rest on grounds that are not covered by the Letter Agreement.

*10 Second, under Texas law, money had and received is
*10 an equitable action that may be maintained to prevent unjust enrichment when the defendant obtains money, which in equity and good conscience belongs to the plaintiff. A cause of action for money had and received is not based on wrongdoing but instead, looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another. It is essentially an equitable doctrine applied to prevent unjust enrichment.

*10 *Doss*, --- S.W.3d at ----, 2006 WL 3093631, at *3 (citations and internal quotation marks omitted). The court is unable to conclude that Redwood has not stated a claim against Holmes to recover money that Holmes has received that rightfully belongs to Redwood.

*10 The court recognizes that to some extent-that is, insofar as Redwood seeks to recover Holmes's future profits from developing Crab Cay Island-a claim for money had and received may be subject to dismissal.
*10 The chose-in-action for money had and received fell within the scope of indebitatus assumpsit. Additionally, the concept of "money" for purposes of the claim has come to mean more than mere coins or dollar bills. For instance [ ], various jurisdictions, and at least one Texas intermediate court of appeals, have indicated that the "equivalent" of money, property received as money, or property converted into money before suit may also be recovered via the cause of action.

*10 *Tri-State Chems., Inc. v. W. Organics, Inc.*, 83 S.W.3d 189, 194 (Tex.App.2002, pet.denied) (citations omitted). Future profits would not appear to qualify as money, the equivalent of money, property received as money, or property converted into money before suit. The court has not found through its own research any indication that Texas currently allows a recovery of lost future profits in an equitable action for money had and received. But as Redwood has pleaded this claim, its complaint refers to at least some benefits that Holmes has already received. *See* Compl. ¶ 70. The court is unable at this stage of the case to conclude that Redwood cannot recover under any set of facts for money had and received, and it denies Holmes's motion in this respect.

4

***10** The court dismisses Redwood's quasi-contractual claim for unjust enrichment but declines to dismiss its actions for quantum meruit or money had and received.

VI

***10** Holmes seeks dismissal of Redwood's claim for misappropriation of trade secrets.

A

***10** Redwood alleges that the Proprietary Information constituted trade secrets under Texas law and that Holmes misappropriated them. Holmes posits that Redwood has not adequately pleaded that any of the information is a trade secret or pleaded the elements of a misappropriation claim. It also contends that, under ¶ 11 of the Letter Agreement, once Holmes reimbursed Redwood for the actual amounts Redwood paid for due diligence expenses, the results of all these efforts, including work product producing the results, became Holmes's exclusive property. Redwood responds that Holmes's reliance on ¶ 11 improperly assumes that Holmes validly repudiated Redwood's exercise of its exclusive right and option under ¶ 9 and ignores the confidentiality provision of ¶ 13 of the Letter Agreement. It posits that, until it is determined that Holmes did not breach the Letter Agreement, Redwood has the right to assert that Holmes cannot use the Proprietary Information.

B

***11** For the reasons explained *supra* at § III(B), the court rejects Redwood's attempt to avoid ¶ 11 by relying on the premise that Holmes breached the Letter Agreement by repudiating Redwood's option under ¶ 9. Under ¶ 11, Holmes purchased the results of the due diligence efforts, including work product that produced these efforts.

***11** This leaves the part of Redwood's claim that is based on ¶ 13. Redwood makes no attempt to explain how information Holmes obtained under the terms of ¶ 13-a confidentiality proviso-constitutes a trade secret. As pleaded, the misappropriation claim makes no reference to ¶ 13. *See* Compl. ¶¶ 76-77. And the term "Proprietary Information," as used in the complaint, appears to relate to due diligence work product covered by ¶ 11. *See* Compl. ¶¶ 42-43. Accordingly, although Redwood may be able to do so by way of amended complaint, it has not at this point stated a claim for misappropriation of trade secrets on which relief can be granted, and this claim is dismissed.

VII

***11** Holmes moves to dismiss Redwood's claim for tortious interference/aiding and abetting.

A

***11** Redwood alleges that Holmes knowingly interfered with Redwood's relationships and/or contracts with the Advisors by asking them to work for Holmes and/or hiring them to do so. Holmes maintains that Redwood has not adequately pleaded this claim because the complaint alleges that Holmes terminated the parties' relationship and, once the Letter Agreement was terminated, Holmes had the right to discuss the Project with other development partners. Holmes also complains that Redwood's other allegations are vague and conclusory and thus insufficient to plead a claim for tortious interference or aiding and abetting as to other advisors. Redwood opposes dismissal, contending that it is conceivable that Holmes breached the Letter Agreement, and that the complaint alleges that Redwood hired the Advisors on a confidential, exclusive basis.

B

***11** Under Texas law, "[a] claim of tortious interference with existing contracts or business relationships requires (1) an existing contract subject to interference; (2) a willful and intentional act of interference with the contract; (3) that proximately caused the plaintiff's injury; and (4) caused actual damage or loss." *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, 2002 WL 1751381, at *25 (N.D. Tex Apr. 4, 2002) (Fitzwater, J.) (citing *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex.1997)). Even assuming that the Letter Agreement cannot serve as the basis for the first element of this claim, the complaint is not restricted to that contract. The court is unable to say that there is no set of facts that would permit Redwood to recover on this basis, and it denies Holmes's motion in this respect.

VIII

***11** Finally, Holmes moves under Rule 12(b)(6) to dismiss Redwood's interpleader claim.

A

***11** Redwood has brought an interpleader claim by tendering into the registry of the court for distribution to the Advisors the sum of $195,404.00 that Holmes paid Redwood under ¶ 11 of the Letter Agreement. Redwood alleges that "various Advisors have made demands on Redwood for payment and it is possible that monies in excess of the Contribution Requirement will be due." Compl. ¶ 91. It asks the court to distribute these funds to the Advisors. Holmes moves to dismiss this claim on the grounds that Redwood is apparently attempting improperly to undo the fact that Holmes paid it in full for the Proprietary Information, and that Redwood has not pleaded any other proper claims in this case, i.e., all of Redwood's claims are subject to dismissal. Redwood responds that Holmes is again relying on an argument that assumes that Holmes did not breach the Letter Agreement by failing to recognize Redwood's exercise of its exclusive right and option under ¶ 9. It argues that the interpleader action ensures that the Advisors will be paid, without Redwood's waiving its right to assert that Holmes was in prior breach of contract.

B

***12** The sole legal basis for Redwood's interpleader claim is the premise that Holmes breached the Letter Agreement by failing to recognize Redwood's exercise of the option under ¶ 9. The court has interpreted ¶ 9 to preclude this assertion. *See supra* § III(B). Accordingly, although Redwood may be able through amendment to state a viable interpleader action, it has not yet done so, and the court dismisses this action for failure to state a claim on which relief can be granted.

IX

***12** The court now turns to Holmes's motion to dismiss under Rule 9(b).

***12** Holmes argues that Redwood's misrepresentation claim must be dismissed because it has failed to plead fraud with particularity. Redwood essentially concedes that it did not comply with Rule 9(b), but it points out that it filed this lawsuit in state court, where the Rule did not apply. Redwood asserts that the court should deny Holmes's motion and allow it to replead.

***12** The court agrees with Holmes that the complaint does not comply with Rule 9(b), and it therefore grants Holmes's motion to dismiss Redwood's misrepresentation claim. As explained *infra* at § X, the court will allow Redwood to file an amended complaint in order to comply with the Rule.

X

***12** Essentially, the result of the court's present decision is to limit the scope of Redwood's lawsuit to contractual, quasi-contractual, and tort claims that pertain to the parties' conduct during or arising from the pre-venture agreement due diligence and negotiation process periods of their relationship. At least part of the lawsuit can continue under these restrictions. In opposing Holmes's motion to dismiss, however, Redwood has requested leave to amend. The court grants the request.

***12** In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.

***12** *In re Am. Airlines, Inc. Privacy Litig.*, 370 F.Supp.2d 552, 567-68 (N.D.Tex.2005) (Fitzwater, J.) (brackets omitted) (quoting *Great Plains Trust Co.*

v. *Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir.2002)). It does not appear to the court that all of Redwood's pleading defects are incurable, and Redwood has not advised the court that it is unwilling or unable to amend in a manner that will avoid dismissal. Accordingly, within 30 days of the date this memorandum opinion and order is filed, Redwood may file an amended complaint.

* * *

***12** For the reasons set out, the court grants in part and denies in part Holmes's June 30, 2006 motion to dismiss. Redwood may file an amended complaint within 30 days of the date this memorandum opinion and order is filed.

***13 SO ORDERED.**

N.D.Tex.,2006.
Redwood Resort Properties, LLC v. Holmes Co. Limited
Slip Copy, 2006 WL 3531422 (N.D.Tex.)

Briefs and Other Related Documents (Back to top)

- 3:06cv01022 (Docket) (Jun. 9, 2006)

END OF DOCUMENT